

Nuclear Regulatory Commission

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proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the NRC and to the courts.

(b) If after the filing of an application for an award, review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a court, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

Subpart C—Procedures for Considering Applications

§ 12.301 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 12.202(b) for confidential financial information.

§ 12.302 Answer to application.

(a) Within 30 days after service of an application, counsel representing the NRC against which an award is sought may file an answer to the application. Unless the NRC counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If the NRC counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer

upon request by the NRC counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the NRC counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, the NRC counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 12.306.

§ 12.303 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 12.306.

§ 12.304 Comments by other parties.

Any party to a proceeding other than the applicant and the NRC counsel may file comments on an application within 30 days after it is served, or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires participation in order to permit full exploration of matters raised in the comments.

§ 12.305 Settlement.

The applicant and the NRC counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the NRC's standard settlement procedure. If a prevailing party and the NRC's counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 12.306 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or the

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NRC counsel, or on the adjudicative officer's own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 12.307 Decision.

(a) The adjudicative officer shall issue an initial decision on the application within 90 days after completion of proceedings on the application. If the adjudicative officer fails to issue an initial decision within 90 days, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(b) The initial decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the NRC's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

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§ 12.308 Agency review.

(a) Either the applicant or the NRC counsel may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative, in accordance with the Commission's review procedures set out in 10 CFR 2.786. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review. If neither the applicant nor NRC counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the NRC forty (40) days after it is issued.

(b) Notwithstanding anything to the contrary in any other part of the Commission's regulations, the initial decision shall be inoperative (i.e., the decision shall not be final and any award made shall not be paid) until the later of—

(1) The expiration of the forty-day period provided in paragraph (a) of this section; or

(2) If within the forty-day period provided in paragraph (a) of this section the Commission elects to review the decision, the Commission's issuance of a final decision on review of the initial decision.

(c) Whether to review a decision on its own motion is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

§ 12.309 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 12.310 Payment of award.

An applicant seeking payment of an award shall submit to the appropriate official of the paying agency a copy of the Commission's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. Where the award is granted against the Commission, the applicant shall make the submission to the Director, Division of Accounting